IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHAS. H. LILLY COMPANY, a corporation,
Plaintiff in Error,

vs.

N. FORD BRENT, doing business under the firm name of Chas. S. Brent & Brother,
Defendant in Error.

No. 1825

Upon Writ of Error to the Circuit Court for the Western District of Washington, Northern Division.

PETITION FOR REHEARING

HAROLD PRESTON and
E. M. CARR,
Attorneys for Defendant in Error.

605 Lowman Building,
Seattle, Wash.

Lowman & Hanford Co., Seattle, Wash.

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Comes now the Defendant in Error and respectfully presents its petition for a rehearing of this case in this court for the following reasons:

The closing paragraph of the opinion delivered herein by the Hon. E. M. Ross, upon the writ of error herein, on the 6th day of February, 1911, is as follows:

"The figures and symbol in parentheses (meaning 14 pounds) so inserted by the plaintiff, taken in connection with the preceding correspondence between the parties, and for the first time appearing therein, are, in our opinion, ambiguous, and their meaning taken in connection with the balance of the correspondence should have been left to the determination of the jury, in view of all the facts and circumstances of the case, under appropriate instructions from the court."

As we understand the opinion of the Court, the decision upon the writ of error is based upon the opinion of the Court that the figures and symbol, to-wit: (14#) occurring in plaintiff's Exhibit "E" (p. 212 Transcript of Record) are ambiguous, and that the question of their meaning should have been submitted to the jury for its decision. We feel that it results entirely from our fault that this Honorable Court has been misled in this particular. The fact is that, while there was such an issue made by the pleadings, it was resolved in favor of the Defendant in Error by all the testimony in the case pertinent to it; but, in our anxiety to impress upon this court our views of what we considered the essential dispute in the case, we neglected to clearly point out to the Court the facts appearing in the record re-

garding the meaning of these figures and symbol, further than calling the attention of the Court, at page 2 of our brief, to the mistake of counsel for Plaintiff in Error in quoting a portion of plaintiff's exhibit "E" as follows: "Testing 21 pounds to the measured bushel," instead of "testing 21# to the measured bushel," which last is the correct reading."

In our amended reply we allege (T. R. Par. 3, p. 14) as follows:

"That said communication (referring to plaintiff's Exhibit "E") was received by the defendant at Seattle on or about the first day of July, 1908; that the figures and character in said letter, to-wit: "(14#)," meant and were intended to mean by the plaintiff, and were understood by the defendant on its receipt thereof to mean fourteen pounds."

Under the rules of pleading in force in the State of Washington, this allegation is deemed to be denied by the defendant. However, Defendant, in Error, plaintiff below, introduced evidence of the meaning of these figures and symbol. Henry Schuett, a witness called by plaintiff below, testified (T. R. pp. 89 and 90) regarding the meaning thereof, as follows:

A. "Oh, they mean pounds."

Q. "How would they be understood generally in the trade?"

A. "Well, that is a pound mark. There is no question about anybody understanding that in the trade."

This is the only testimony in the case on this subject, and if the case had been submitted to the jury they could only have found that the meaning of the figures and symbol was fourteen pounds. There being an issue on this point, and testimony in favor of the plaintiff in support of his contention, and absolutely no testimony to the contrary, the fact could only have been found in favor of plaintiff's contention. Plaintiff in Error did not upon the trial dispute in any wise that (14#) meant and was understood by it to mean fourteen pounds. It accepted that meaning as applying not only to our, but to its own letters, and contended that while knowing that we said 14 pounds, we meant it only as a direction to sow 14 pounds to the acre. In fact, it was in no position to make any such contention, as throughout its own correspondence the same symbol " # " is used as meaning pounds. We refer the Court to the following letters of Plaintiff in Error, in which this symbol is used:

Plaintiff's Exhibit "I," page 214 of Transcript of Record, being letter from Plaintiff in Error to Defendant in Error, from which we quote: "Think you are mistaken, however, in saying 36,000# constitute the minimum car for business bound for the Pacific Coast." This was in answer to Plaintiff's Exhibit "H" (T. R. p. 213), in which Defendant in

Error said: "You do not seem to understand that 36,000# now constitutes a minimum carload. If you want to take only 15 tons and pay the additional freight it will be satisfactory to us."

Plaintiff's Exhibit "L" (T. R. p. 215), which we quote in full:

"Seattle, 8-27-08.

"Chas. S. Brent & Brother,

"Paris, Kentucky.

"Gentlemen: We have your invoice of August 22nd and wired you today as follows: 'Cannot accept car. Invoice should be about $2,000.00 instead of $3,000.00.'

"At $1.40 per 21# would be less than $7.00 per 100 and 30,000# at $7.00 per 100 would be $2,100.00. We do not understand why you should have put more than this in the car as we specially provide in our requisition of June 22nd (referring to Plaintiff's Exhibit B, being Plaintiff in Error's letter confirming its telegraphic acceptance of our offer) that it was to be a minimum car weighing 21# to the bushel and later on in our letter of July 2nd called your attention to the fact that it was to be a minimum car of 15 tons and no more.

"Yours truly,

"THE CHAS. A. LILLY CO.,

"Per Frank Leckenby, Vice-Pres."

This (Plaintiff's Exhibit B) was the formal and definite acceptance of our offer. In referring to it

Plaintiff in Error quotes from it 21# as meaning the same as 21 ℔, or rather says in effect "the symbol # now used by us means the same as the symbol ℔, used in our letter of June 22nd."

Plaintiff's Exhibit "V" (T. R. p. 223) which we quote in full:

"Seattle, Sept. 16th, '08.

"Chas. S. Brent & Bro.,

"Paris, Ky.

"Gentlemen: We enclose herewith our check #59821 for the sum of $2,006.67. This is in full payment of L. & N. #3364 which contained 30,240# or 1433 1-3 bushels @ $1.40 per bushel of 21#, as per your quotation, making a total of $2006.67 the amount of our check.

"Yours truly,

"THE CHAS. H. LILLY CO.,

"By W. S. Personeus, Treasurer."

We thus have an issue of fact with competent, credible and uncontradicted testimony in favor of Defendant in Error and, further, a chain of correspondence passing between the parties from which it appears that both parties habitually used and understood the symbol " # " as meaning pounds. Furthermore, we think we have the right to say that during an argument addressed by counsel for Defendant in Error to the court, reference was made to the fact that evidence had been introduced showing the meaning of the symbol to be pounds, and that the same was uncontradicted, and that the District

Judge, having the correspondence before him, said in effect that Plaintiff in Error was not in a position to dispute such meaning as it had used the same symbol throughout its own letters, and that if the symbol did not mean pounds to the plaintiff it did not mean pounds to the defendant; and that thereupon counsel for Plaintiff in Error said, in substance, "Of course it means pounds. It couldn't mean anything else." This does not appear in the record, but it is a fact which counsel for Plaintiff in Error will not deny. It would be unfortunate, indeed, to have the decision of so important a case rest upon a misunderstanding of the facts. We feel very keenly our failure to attach to this point the importance which it deserved, and confidently submit that if, upon a re-examination of the record, the court finds that we are correct in what we have said in support of this petition, it will not visit the consequences of our inadvertence upon Defendant in Error.

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